No. 13,695

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

EDWARDS E. MERGES,
1511 Smith Tower, Seattle, Washington,
Attorney for Appellee and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 13,695

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the appellee and respectfully petitions the Court for a rehearing en banc upon the following grounds and for the following reasons:

1. CASES OF WONG WING FOO v. McGRATH, 196 F. 2d 120 AND MAR GONG v. BROWNELL, 209 F. 2d NO. 448 ARE IMPLIEDLY OVERRULED.

The opinion filed March 30, 1954, states on pages 3 and 4 that the appellee did not allege in his complaint that he had been denied any "right or privilege" as a national of the United States. Examination of the transcript at pages 5 and 6 shows that the complaint contained the following allegations:

"VIII.

"That in February of 1951 or approximately *one year ago,* the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit stating his relationship to the plaintiff and all the particulars concerning him and that said identification affidavit was prepared for the purpose of securing from the American Consul General in Hong Kong, a travel document to enable the plaintiff to travel to the United States; and that *said identification affidavit was filed with said American Consul shortly thereafter* so the plaintiff would be eligible to purchase transportation to the United States in order to apply for admission here under the immigration laws as a citizen thereof, but that the Consul failed and neglected to take any action upon said application and on *October 11, 1951, wrote a letter stating that plaintiff had been interviewed at the office of the American Consul but had not presented sufficient evidence to enable the Consul to issue him a final document and that it was indefinite when any travel document would be issued* because there were approximately 1800

cases ahead of the plaintiff's but that there is in truth and in fact no good reason for such delay because the plaintiff has submitted adequate and competent evidence of his citizenship and right to come to the United States and that the *American Consul, upon information and belief of the plaintiff, has no intention of issuing the plaintiff a travel document and that a year's time is an unreasonable delay inasmuch as the plaintiff's right to a travel document could be determined on a basis of the affidavits submitted* and that in any event, the plaintiff is subject to examination by the United States immigration authorities but by reason of the American Consul's action aforesaid, *the plaintiff has been stopped from coming to the United States and from applying to and presenting his proof to the Immigration Service at a port of entry in the United States,* and that the said action of the American Consul has been referred or appealed to the Secretary of State upon information and belief of plaintiff. *That plaintiff is informed and believes and therefore alleges that no action will be taken upon said application and that if any action is taken on it, it will be unfavorable,* and that plaintiff has no other remedy at law or otherwise except the present one."

Section 503 is very broad in its terms. It says that

"If any person who *claims* a right or a privilege as a national of the United States is denied such right or privilege by any department or agency or executive official thereof upon the ground that he is not a national of the United

> States, *such person,* regardless of whether he is within the United States or abroad, *may institute an action* against the head of such department." (Italics ours.)

The exact right or privilege is not specified and it will be noted that a *claim* on the part of such person is sufficient to entitle him to relief under the statute. It is difficult to imagine how a statute could be made more broad. Surely the complaint in the instant case is sufficient and apparently it was so considered by the defendant since no motion to dismiss was made either prior to or at the time of trial.

What constitutes a denial of a right or privilege under the statute has been defined by this Court in the *Wong Wing Foo* case, supra, where Judge Denman, speaking for the Court, said:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' is to succeed some prior administrative proceeding. *This section is largely invoked where there has been no administrative proceeding at all.* Such is the case where the Department of State refuses to give a passport, Perkins v. Elg, 307 U.S. 325; Podea v. Acheson, 179 F. 2d 306 (Cir. 2); or where a consul refuses to register a person as a United States national, Acheson v. Mariko Kuniyuki, 189 F. 2d 741 (Cir. 9); *or refuses to allow a person claiming American citizenship to come to this country,* Acheson v. Yee King Gee, 184 F. 2d 382 (Cir. 9); or where American citizens acting under claimed duress have filed with the Attorney General notices of their

renunciation of citizenship and then later seek to have them set aside, McGrath v. Tadayasu Abo, 186 F. 2d 766 (Cir. 9) * * *

* * * * * * *

"We do not think the independence of the 903 action is lost in other cases where the denial of 'the right or privilege' is preceded by a hearing at which findings are made and a decision reached. The right to citizenship is a priceless thing and Congress in enacting Section 903 in 1940 well could have decided that citizenship should not be denied one possessing it, by an administrative proceeding. * * *" (Italics ours.)

It would appear that the opinion in the instant case is inconsistent with the opinion in the Wong Wing Foo case, supra, and the law, therefore, as to what constitutes denial of a right or privilege should be considered by the entire Court.

The trial Court in the instant case made the following findings (Tr. 24):

"IV.

"That in February of 1951 the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit, stating his relationship to the plaintiff and all the particulars concerning the same and that said affidavit was prepared for the purpose of securing from the American Consul at Hong Kong a travel document to enable the plaintiff to travel to the United States; *and that said identification affidavit was filed with the American Consul but that the American Consul*

failed to grant the plaintiff any travel document." (Italics ours.)

This finding was made on a basis of *uncontroverted evidence* and we respectfully submit that the setting aside of the findings of the trial Court in this case overrules the case of *Mar Gong v. Brownell,* supra, where the Court said:

"Upon this appeal it is argued that such findings are clearly erroneous in that all of the witnesses testified positively that Mar Kwock Tong, admittedly an American citizen, married Chin Poy Sue and that the plaintiff, Mar Gong, was born to that marriage in China as the couple's second child. It is urged that this positive testimony was uncontradicted and we must follow the rule stated in *Ariasi v. Orient Ins. Co.* (9 Cir.), 50 F. 2d 548, 551, to the effect that in the absence of contradictory evidence and any inherent improbability in the testimony a court cannot arbitrarily reject the testimony of a witness which appears credible.

"This court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness' testimony even although that testimony is not contradicted. National Labor Relations Bd. v. Howell Chevrolet Co., 204 F. 2d 79, 86 (affirmed Howell Chevrolet Co. v. Labor Bd., ... U.S. ....., Dec. 14, 1953)."

2. KIYOSHI KAWAGUCHI v. ACHESON, 9 CIR., 184 F. 2d 310, AND ACHESON v. NOBUO ISHIMARU, 9 CIR., 185 F. 2d 547 ARE OVERRULED.

The opinion filed March 30, 1954, stated that the District Court had no jurisdiction to require the issuance of a certificate of identity to permit the appellee to come to the United States for a hearing in accordance with Section 503 of the Nationality Act of 1940 upon the question of his nationality. This overrules the cases of *Kawaguchi,* supra, and *Ishimaru,* supra.

In the *Kawaguchi* case the Court said:

> "Where such an application is made in good faith and the claim of citizenship has a substantial basis, such a certificate must issue to enable the applicant to travel to the United States for the limited purpose of attending and testifying at the trial of his pending action."

In the *Ishimaru* case the Court said:

> "By this order the District Court but took a step toward final disposition of the merits of the case."

It is clear from the above quoted that the opinion in the *Kawaguchi* and *Ishimaru* cases and the opinion in the instant case are inconsistent.

SUMMARY AND CONCLUSION.

1. The opinion is inconsistent with the opinion in the case of Wong Wing Foo without specifically overruling it.

2. The opinion is inconsistent with the case of Mar Gong without specifically overruling it.

3. The opinion is inconsistent with the cases of *Kawaguchi* and *Ishimaru* without specifically overruling them.

While the Court states, "We disagree with, and decline to follow, decisions holding that District Courts had jurisdiction to make such orders in actions under Section 503 of the Nationality Act of 1940, 8 U.S.C., Section 903," it is not clear whether or not the *Kawaguchi* and *Ishimaru* cases are specifically overruled. In view of the quotations from the *Kawaguchi* and *Ishimaru* cases, it would appear that they cannot be distinguished in principle.

In final conclusion we submit the statement of the *Supreme Court* in the late case of *Johnson v. Eisentrager,* 70 S.Ct. 936 where it said:

> "The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. If a person's claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen 'regardless of whether he is within the United States or abroad.' 54 Stat. 1171, 8 U.S.C. Section 903, 8 U.S.C.A. Section 903."

Dated, Seattle, Washington,
April 28, 1954.

Respectfully submitted,
EDWARDS E. MERGES,
Attorney for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Seattle, Washington,
April 28, 1954.

EDWARDS E. MERGES,
Attorney for Appellee
and Petitioner.